

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Steven R. Johnson,

Debtor(s).

Case No.: 02-41301

Chapter 13 Case

**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF
CHAPTER 13 PLAN AND FOR CONVERSION OF CASE TO A CHAPTER 7 CASE**

TO: All parties in interest pursuant to Local Rule 9013-3.

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:00 a.m. on June 6 2002, in Courtroom No. 7 West, United States Courthouse, 300 South 4th Street, Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:00 a.m., June 5, 2002, which is 24 hours before the time set for the hearing, or filed and served by mail not later than June 3, 2002, which is three days before the time set for the hearing. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on April 9, 2002. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-2, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. Movant requests relief with respect to denial of confirmation of the debtor's Chapter 13 plan dated February 14, 2002 (the "Plan").

6. Among the assets which the debtor has claimed as exempt under his Schedule C – Property Claimed Exempt on file herein is an asset identified as "MARITAL LIEN – HOMESTEAD" in which the debtor claims an exemption of \$39,700 under "MSA S550.01, 550.02."

7. Section 550.01 of Minnesota Statutes deals with enforcement of judgments and generally provides that judgments may be enforced for a period of ten years following their

entry. Minn. Stat. § 550.02 describes methods of enforcement of judgments. Neither statute provides an exemption for property of the type described in the debtor's Schedule C.

8. Presumably, the debtor intended to cite Minn. Stat. §§ 510.01 and 510.02 as the basis of his claim of exemption, as these statutes define the homestead exemption under Minnesota law, as well as the size and value limitations on the Minnesota homestead exemption.

9. The debtor testified to the following facts at his meeting of creditors held pursuant to 11 U.S.C. § 341(a) on May 8, 2002:

- a. He moved out of the real property described in Schedule C in September 2001.
- b. His marriage dissolution decree was entered in October 2001.
- c. By the terms of the marriage dissolution decree, his ex-wife was awarded the family homestead and he received a lien against the home, payable when his daughter graduates from high school.
- d. He did not file any documents with the county recorder's office to preserve his homestead exemption upon moving out of the marital home.

10. Although duly requested of the debtor at his meeting of creditors on May 8, 2002, the debtor has not provided the Trustee with a copy of his marriage dissolution decree to date.

11. According to the information provided in the debtor's Schedule I on file herein, the debtor's daughter was 14 years old at the time this case was filed.

12. The debtor's Plan proposes payments of \$250 per month to the Trustee for a period of 60 months, for a total of \$15,000 (the "Plan Funds"). After payment of the debtor's attorney fees and a secured claim in favor of Circuit City, the balance of the Plan Funds, net of the Trustee's statutory fee, are allocated for priority unsecured tax claims, estimated at \$10,681, and the remainder, estimated at \$1,044, to the debtor's nonpriority unsecured creditors, whose claims are estimated at \$86,937, a dividend of approximately 1.2%.

13. Separately, the Trustee has filed or will file an objection to the debtor's claim of exemption to the Marital Lien, on the grounds that lien rights do not qualify for exemption under Minnesota law, under either Minn. Stat. §§ 550.01, 550.02 or 510.01, 510.02.

14. The Trustee objects to the Plan on the grounds that the value, as of the effective date of the Plan, of property to be distributed to allowed unsecured claims is less than the amount that would be paid on such claims if the debtor's estate were liquidated under Chapter 7, contrary to 11 U.S.C. § 1325(a)(4). In addition to the \$39,700 Marital Lien, the debtor has other nonexempt assets totaling at least \$1,681 in value, according to the debtor's schedules.

15. The debtor's attempt to exempt and retain his non-exempt marital lien asset constitutes bad faith, contrary to 11 U.S.C. § 1325(a)(3).

16. It is in the best interests of the debtor's creditors that this case be converted to a case under Chapter 7 of Title 11, United States Code, and a trustee appointed to collect and

liquidate the debtor's nonexempt assets for the benefit of his creditors.

17. If necessary, the debtor and/or the debtor's former spouse may be called to testify in connection with this motion.

WHEREFORE, the Trustee moves the court for an order denying confirmation of the debtors' proposed Chapter 13 plan dated February 14, 2002, for conversion of this case to Chapter 7, and such other relief as may be just and equitable.

Dated: May 23, 2002

Signed: /e/ Thomas E. Johnson
Thomas E. Johnson, ID # 52000
Eric J. Sherburne, ID # 279389
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402
(612) 338-7591

VERIFICATION

I, Thomas E. Johnson, employed by the Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 23, 2002

Signed: /e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
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MEMORANDUM OF FACTS AND LAW

FACTS

The Trustee respectfully refers the reader to the facts detailed in the accompanying verified Motion, which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

The Trustee's primary objection to confirmation is that the debtor's proposed Chapter 13 plan does not meet the "best interests of creditors" test of 11 U.S.C. § 1325(a)(4). In order to meet this test, the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim, must be at least equal to the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 on that date. *11 U.S.C. § 1325(a)(4)*. In this case, the debtor has chosen his exempt property under Minnesota state law, and federal nonbankruptcy law. He has attempted to exempt his marital lien on his former homestead under Minnesota law, presumably under the Minnesota homestead exemption statute (Minn. Stat. §§ 510.01, 510.02). However, these statutes provide no exemption for a marital lien awarded pursuant to a divorce decree. Whatever this asset may be, it is clearly not a "homestead" under Minnesota law.

The present case is factually similar to *In re Mueller*, 215 B.R. 1018 (8th Cir. BAP 1998). There, the Bankruptcy Appellate Panel affirmed a decision by Judge Kishel in which he sustained a trustee's objection to a debtor's claim of exemption under Minnesota law to a right of payment from her former spouse secured by a lien in her former marital residence. There, as here, the debtor had moved out of the family home prior to filing for bankruptcy and prior to the entry of her marriage dissolution decree. *215 B.R. at 1020*. Thus, the debtor did not "occupy" the real property in question. As noted by the BAP, a mere lien interest in real property does not constitute "ownership," as required under the Minnesota homestead exemption statute. *Id. at 1023, fn. 8*. Therefore, neither ownership nor occupancy of the real property in question has been shown, to justify the claim of "homestead" exemption in the debtor's marital lien.

The value of the debtor's nonexempt assets is at least \$41,251 (\$39,700 marital lien + \$1,681 other nonexempt assets). The proposed payout to unsecured creditors (priority and nonpriority) is only \$11,725. The Trustee contends that any payout over the length of the

debtor's proposed plan that is less than the value of his nonexempt assets violates 11 U.S.C. § 1325(a)(4) and therefore confirmation must be denied.¹

The determination of whether a Chapter 13 plan has been proposed in "good faith" is based on the totality of the circumstances. *In re Molitor*, 76 F.3d 218, 220-221 (8th Cir. 1996) (citing *In re LeMaire*, 898 F.2d 1346, 1349 (8th Cir. 1990)). The Trustee contends that the debtor's unwarranted attempt to exempt his marital lien interest and thereby reduce the amount he is required to pay to his unsecured creditors supports the conclusion that the Plan was filed in bad faith and confirmation must be denied.

Conversion of a case under 11 U.S.C. § 1307(c) is appropriate where "cause" is shown. The statute contains a nonexclusive list of grounds constituting "cause." The Trustee contends that it is in the best interests of the debtor's creditors that this case be converted to a case under Chapter 7, so that a trustee can be appointed and the debtor's nonexempt assets liquidated.

CONCLUSION

Confirmation of the Plan should be denied and this case converted to a case under Chapter 7, for the reasons stated herein.

Dated: May 23, 2002

Respectfully submitted:

/s/ Thomas E. Johnson
Thomas E. Johnson, ID # 52000
Counsel to Chapter 13 Trustee
12 South 6th Street, Suite 310
Minneapolis, MN 55402-1521
(612) 338-7591

¹ A more detailed analysis of the "best interests of creditors" issue would involve a discussion of how to arrive at the net liquidation value of the debtors' estate in a Chapter 7 case (i.e., after payment of the Chapter 7 Trustee's fees and compensation and any other administrative expenses in the Chapter 7 case), and comparing this figure to the discounted value of the debtor's proposed stream of payments over the five years of their Plan. Unless the debtor challenges the issue, it is the Trustee's contention that the "best interests of creditors" test is only met if the total payout by the debtor to his unsecured creditors is equal to or greater than the value of his equity interest in his nonexempt assets.

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**ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN AND CONVERTING
CASE TO A CASE UNDER CHAPTER 7**

At Minneapolis, MN, _____, 2002.

The above-entitled matter came before the undersigned United States Bankruptcy Judge on the motion of Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee") objecting to confirmation of the debtors' Chapter 13 plan and for conversion of the case.

Appearances, if any, were noted in the minutes.

Upon the foregoing motion, arguments of counsel, and upon findings of fact and conclusions of law, if any, read into the record,

IT IS ORDERED:

1. Confirmation of the debtor's Chapter 13 plan dated February 14, 2002 is
DENIED.
2. This case is converted to a case under Chapter 7, Title 11, United States Code.

Nancy C. Dreher
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on May 23, 2002, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan and for Conversion of Case, Memorandum of Facts and Law and proposed Order on the individual(s) listed below, in the manner described:

By personal delivery next business day:

United States Trustee
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

By first class U.S. mail, postage prepaid:

Robert J. Everhart, Esq.
Attorney at Law
P.O. Box 120534
New Brighton, MN 55112

Steven R. Johnson
1150 Hennepin Ave., Apt. H 2404
Minneapolis, MN 55403

Lance J. Vander Linden, Esq.
Attorney at Law
P. O. Box 829009
Dallas, TX 75382-9009

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: May 23, 2002

/e/ Thomas E. Johnson